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Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, and LEONARD NACHTMAN,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Can conduct that occurs after the passage of a statute, but ceases before its effective date, be criminally punished as a conspiracy to defraud the United States even though the conduct, at the time it occurs, violates no law and does not defeat any lawful function of the government?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Second Circuit reversing the decision of the District Court was rendered on September 6, 1988. That opinion, reported at 857 F.2d 76, is reproduced at A-1.[1] The November 25, 1987 Memorandum and Order of the District Court for the Southern District of New York dismissing the indictment is reproduced at A-10.

JURISDICTION

The September 6, 1988 order of the Court of Appeals for the Second Circuit was entered on that date. Rehearing was denied on October 6, 1988. (A-18.) This petition for certiorari was filed within 60 days of the date of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the Constitution and statutes are cited in this petition, and are reproduced in the Appendix at the pages shown:

U.S. Const. art. 1, § 9, cl. 3, at A-23.

18 U.S.C. § 371, at A-26.

26 U.S.C. § 469 (in pertinent part), at A-23.

Tax Reform Act of 1986, Public Law 99-514, § 501 (in pertinent part), at A-23.

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1 Page references to the Appendix to this Petition are cited as "A-__".

STATEMENT OF THE CASE

This petition presents significant questions concerning the interpretation of the *ex post facto* clause of the Constitution and the application of the federal conspiracy statute, 18 U.S.C. § 371.

The Second Circuit has held that an indictment charging a conspiracy to defraud, the goal of which was to circumvent and defeat the Internal Revenue Service's ("IRS") collection of revenue under a particular statute, is valid even though the conspiracy was abandoned before that statute became effective and had no continuing consequence after the statute's effective date. The Second Circuit's conclusion that the indictment does not violate the *ex post facto* clause is at variance with decisions of this Court and of other circuits, and with its own earlier decisions. The Second Circuit's conclusion effectively denies due process: it holds that a person can be convicted of conspiracy to defraud for actions performed at a time when there was no lawful government function that the actions could have impeded.

The Indictment

Congress passed the Tax Reform Act of 1986 on October 22, 1986. Section 501, codified as 26 U.S.C. § 469, governs losses and credits from passive business activities. That section disallows deductions from salary and active business income for passive losses generated by transactions entered into after October 22, 1986; limitations on deductions for passive losses generated by interests already held on October 22, 1986 are phased in gradually. Congress provided for § 501 to be effective on January 1, 1987, ten weeks after the October 22 enactment date.

The single count indictment charges that the defendants conspired, in violation of 18 U.S.C. § 371, to defraud the United States and the IRS and that the goal of the conspiracy was "to circumvent and defeat the provisions of the Tax Reform Act of 1986." (A-21.)

The indictment alleges as overt acts a series of meetings and telephone conversations among the defendants and IRS agents (acting in an undercover capacity) concerning the sale of interests in a real estate tax shelter, and the proposed backdating of documents evidencing the sale. (A-21-22.) All of the overt acts alleged in furtherance of the conspiracy occurred between October 22, 1986 and December 9, 1986. The last overt act of the conspiracy was a December 9, 1986 meeting with an undercover agent where backdating was discussed. Although the government waited until March 20, 1987 to arrest the defendants, no backdating ever occurred.

In the proceedings before the District Court, the government did not dispute the assertion that it had no evidence whatever of any conspiratorial acts undertaken after December 9, 1986—some three weeks before the effective date of § 501. (Joint Appendix at 162, *United States v. Rosengarten*, 857 F.2d 76 (2d Cir. 1988) (No. 88-1002) (Nov. 10, 1987 Hearing before Hon. Charles L. Brieant).) In short, the indictment charges a conspiracy to circumvent § 501 at a time when that statute had no force or effect.

The Opinions Below

Three of the defendants moved to dismiss the indictment on the ground that it violates the defendants' constitutional rights as an *ex post facto* application of § 501 of the Tax Reform Act.[2] The District Court agreed and dismissed the indictment, holding that *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), requires the indictment to charge "some act in furtherance of the conspiracy occurring after the effective date of the statute, in order not to violate the *ex post facto* clause." (A-17.) In *Binder*, the Second Circuit had upheld convictions for conspiracy to defraud based on the actions defendants took *after* the effective date of the relevant tax statute. (See discussion *infra* at pp. 10-11.)

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2 A fourth defendant pleaded guilty and is expected to testify for the government.

In reversing the District Court's order here, the Second Circuit reasoned that *Binder* does not require dismissal, since the conduct of these defendants took place after the statute's enactment, albeit before its effective date. (A-9.) The Second Circuit concluded that the indictment did not violate the *ex post facto* clause because "the effective date of section 501 . . . was not determinative of whether appellees committed the crime of conspiring to defraud the United States. Appellees were not charged with violating section 501." (A-7.)

Appellees sought rehearing, arguing that the panel's opinion was irreconcilable with previous decisions construing the *ex post facto* clause, and that the effect of the decision is to permit the government virtually unlimited discretion to indict under 18 U.S.C. § 371 for conspiratorial conduct that ceased before the alleged goal of the conspiracy ever became criminal. Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

This petition presents a significant question, and one likely to recur with some frequency (see note 6, *infra*), concerning the constitutional guarantee against enactment of *ex post facto* laws, namely, whether conduct occurring between the enactment and the effective date of a statute can be the basis for a conspiracy to defraud indictment.[3]

The government alleges that the defendants conspired to defraud the IRS by agreeing with an undercover IRS agent to backdate subscription documents for a tax shelter limited partnership. Such backdating, had it taken place, would have enabled the agent's "clients" to take deductions for losses

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3 This Court has reviewed interlocutory claims regarding similar basic constitutional rights. *E.g.*, *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy clause); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (speech and debate clause). *See also Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Midland Asphalt Corp. v. United States*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S. Ct. 2869 (1988).

derived from the partnership during the phase-in period of § 501 of the Tax Reform Act. However, the backdating never occurred, and § 501 was not in effect at the time of the alleged agreement to backdate the documents. It necessarily follows that no crime was committed. Convicting defendants whose conduct violated no substantive statute or rule, where at the time of their conduct there was not yet any governmental function in effect that they could have interfered with, would plainly violate the *ex post facto* clause of the Constitution.

POINT I

THE DECISION IS IN CONFLICT WITH THIS COURT'S PRIOR DECISIONS CONSTRUING THE *EX POST FACTO* CLAUSE

Article I, § 9 of the Constitution provides simply that "No Bill of Attainder or *ex post facto* law shall be passed." This Court has read the prohibition against *ex post facto* laws to encompass not only laws which on their face impose punishment for acts that were not punishable when committed, but also the retrospective application of laws by the courts. *Bouie v. City of Columbia*, 378 U.S. 347, 352-53 (1964). *Bouie* and other decisions of this Court have given force to the intent of the framers of the Constitution that the clause protect individuals from charges based on actions that were not punishable when undertaken.[4]

This Court first addressed the principles underlying the *ex post facto* clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), where Justice Chase found that the prohibition was intended to correct a variety of evils, and that it applied, *inter alia*, to:

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4 As Alexander Hamilton wrote, *ex post facto* laws are one of "the favorite and most formidable instruments of tyranny." *The Federalist Papers*, No. 84, at 261 (R. Fairfield 2 ed. 1966).

> Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. . . .

3 U.S. (3 Dall.) at 390.

The Second Circuit here in effect gave undue weight to Justice Chase's use of the phrase "before the passing of the law." It reasoned that the *ex post facto* prohibition has no application because the Tax Reform Act had already been passed, and therefore these defendants had notice that their conduct (if it continued) would violate the Tax Reform Act once it became effective.[5] (A-7-8.)

But notice is not determinative. An early decision of this Court makes clear (as do the decisions of the Courts of Appeals discussed in Point II) that the effective date, and not the date of passage, is determinative, and that conduct occurring between the enactment and effective dates of a statute cannot, by itself, trigger the application of that statute. This Court held in *In re Medley*, 134 U.S. 160 (1890) that a Colorado sentencing law, enacted on April 19, 1889 but by the state constitution not effective until 90 days after passage, was not "in force prior to the 19th of July, 1889, and that the crime, having been committed in May of that year, was to be governed in all particulars . . . by the law then in force . . . ." 134 U.S. at 166. Thus, those provisions of the new sentencing law which disadvantaged the defendant were *ex post facto* and unenforceable as to him. *Id.*

Other decisions of this Court emphasize the importance in *ex post facto* analysis of the relationship between the conduct at issue and the effective date of the relevant statute, thus making it clear that the *ex post facto* clause serves interests beyond

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5 The government's argument below, that an indictment for conspiracy to defraud under § 371 cannot present *ex post facto* problems because § 371 has been in effect for decades, ignores the role played by the Tax Reform Act in the indictment. Brief for the United States of America at 1-2, *United States v. Rosengarten*, 857 F.2d 76 (2d Cir. 1988) (No. 88-1002). See *infra* at pp. 13-14.

notice. *Burgess v. Salmon*, 97 U.S. 381 (1878) involved a law raising the tax on tobacco which took effect when it was signed by the President on the afternoon of March 3, 1875. Tobacco on which the lower tax had been paid was removed from a warehouse before noon. This Court held that civil or criminal penalties for nonpayment of the higher tax were barred by the *ex post facto* clause. The holding turned on the technical point of when the law became effective, not on notice.

In *Kring v. Missouri*, 107 U.S. 221 (1883), the defendant, charged with first-degree murder, pleaded guilty to second-degree murder based upon a negotiated sentence. He was sentenced to a longer term than that to which he had agreed, appealed, and won. After remand, he refused to withdraw his guilty plea but was nonetheless tried and convicted on the first-degree murder charge. Under the law in effect at the time of the murder, the defendant could not be tried on the first-degree murder charge after his guilty plea. Between the time of the murder and the guilty plea, an amendment to the state constitution authorizing such a trial became effective. Thus, while the defendant had notice at the time of his guilty plea, this Court held that the application of the amendment violated the *ex post facto* clause. 107 U.S. at 225-26.

Other authorities agree with this analysis:

> Whether it is ex post facto to apply an act to a particular offense depends on the relation between the time of the offense *and the time when the act takes effect, regardless of the time of its promulgation or publication or of notice of it given to or received by the public.*

2 *Sutherland Stat. Const.* § 42.01 at 442 & n.12 (Sands 4th Ed. 1986) (footnote omitted; emphasis added). *See also Hartung v. People*, 22 N.Y. 95, 104 (1860) ("No one can be criminally punished in this country, *except according to a law prescribed for his government by the sovereign authority, before the imputed offense was committed, and which existed as a law at that*

time''), quoted with approval in *Kring v. Missouri*, 107 U.S. at 230-31 (emphasis in original).

The Second Circuit's disregard for the difference between the enactment and effective dates of the statute is thus contrary to substantial precedent.[6] Although the government has conceded that the defendants could not have been charged with a conspiracy to evade taxes in violation of § 501 because to do so would violate the *ex post facto* clause,[7] § 501 is nevertheless the linchpin of the indictment. Without it, the government would bear the impossible task of demonstrating that an agreement merely to backdate documents constituted a conspiracy to defraud the United States. Absent § 501, there would not have been any indictment.

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6 Where Congress specifically includes an effective date as an integral part of a statute, that date is controlling:

> The power to enact laws includes the power to fix a future effective date. A statute with a definite effective date commences operation from that time.

2 *Sutherland Stat. Const.* § 33.07 at 16 (Sands 4th ed. 1986) (footnotes omitted). *See also Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1527 (S.D.N.Y. 1983) (*citing Ocean & Atmospheric Science, Inc. v. Smyth Van Line, Inc.*, 446 F. Supp. 1158, 1159 (S.D.N.Y. 1978)). In 1988, Congress passed at least 17 laws that contained delayed effective dates. (Figure compiled from 1988 *U.S. Code Cong. & Admin. News* (102 Stat.), Vols. 1-8 (April 1988-November 1988).)

Although some cases in this Court recite the prohibition against *ex post facto* laws in terms of the enactment date of the relevant statute, *e.g.*, *Miller v. Florida*, 107 S. Ct. 2446 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981), a reading of those decisions demonstrates that the terminology was not important because the enactment and effective dates were identical.

7 Brief for the United States of America at 14, *United States v. Rosengarten*, 857 F.2d 76 (2d Cir. 1988) (No. 88-1002).

POINT II

THE DECISION IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUITS AND BY THE SECOND CIRCUIT ITSELF

The Third, Fourth, Fifth, Sixth and Ninth Circuits have each held that, in order to avoid violating the *ex post facto* clause, a conviction for conspiracy to violate a law requires evidence that the conspiracy continued by overt acts into the *effective* period of the underlying statute that made the conspiracy criminal.[8]

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8 *E.g.*, *United States v. Goldberger*, 197 F.2d 330 (3d Cir.), *cert. denied*, 344 U.S. 833 (1952) (convictions under § 371 did not constitute *ex post facto* application of law increasing penalty for conspiracy where some acts occurred after law's effective date); *United States v. Johnson*, 537 F.2d 1171, 1175 (4th Cir. 1976) (Comprehensive Drug Abuse Prevention and Control Act was not applied *ex post facto* where conspiracy to violate law continued after statute took effect); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (convictions on charges of conspiring to violate racketeering statute were reversed because jury was not instructed that it had to find that at least one overt act took place after law's effective date); *United States v. Marchesani*, 457 F.2d 1291 (6th Cir. 1972) (indictment was not *ex post facto* application of law where conspiracy continued "well past" the statute's effective date); *Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967) (conspiracy to violate narcotics laws continued past effective date of amendment to statute, and therefore imposition of greater penalty authorized by amendment was not *ex post facto* application of law). *See also United States v. Annoreno*, 460 F.2d 1303, 1307 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972) (convictions for conspiracy to commit federal offense upheld notwithstanding that evidence was admitted of transactions predating applicable statute, since jury was charged that it had to find that overt act occurred after enactment of the statute); *Christianson v. United States*, 226 F.2d 646 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956) (conviction for conspiracy to violate statute prohibiting interstate transportation of gambling devices upheld because defendants reaffirmed conspiracy through overt acts after statute's effective date).

There is no reason to treat conspiracies to defraud differently from conspiracies to commit an offense. In both kinds of cases, some reference point external to the conspiracy statute must be identified in order

United States v. Binder, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), on which the District Court relied, is consistent with these authorities and directly conflicts with the decision below. Between July 19, 1963 and September 2, 1964, aware of the imminent passage of a new tax which would be retroactive to the date of the speech proposing it (July 19, 1963), defendants created a series of sham transactions. The speech, like passage of the Act here, put defendants on notice of an intended change in the tax laws. But, unlike the defendants here, where no overt act was committed after the effective date of § 501, the *Binder* defendants committed other overt acts *after* September 2, 1964 for the purpose of evading the tax.

The Second Circuit's rejection of defendants' argument that their convictions violated the *ex post facto* clause rested squarely on their post-September 2 conduct:

> [T]here is substantial evidence that each of the [defendants] was a participant in the conspiracy and that each *had engaged in overt acts after September 2, 1964*. The evidence relating to pre-September 2, 1964 acts was admissible to prove the existence and purpose of the conspiracy. *Since each appellant reaffirmed his participation in the conspiracy after September 2, 1964 the convictions do not violate the ex post facto clause.*

453 F.2d at 808 (emphasis added).[9]

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for there to be a valid indictment. A conspiracy to defraud under § 371 must be defined by reference to some other statute, rule or particular government function, to avoid constitutional due process objections on grounds of vagueness. *See United States v. Gradwell*, 243 U.S. 476 (1917); *United States v. Porter*, 591 F.2d 1048, 1055-56 (5th Cir. 1979); *United States v. Anderson*, 579 F.2d 455 (8th Cir. 1978) (impeded lawful governmental function derived from requirements of statute and regulations). *See generally, e.g.*, Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959); Memorandum of Law of the United States filed by the Department of Justice as *Amicus Curiae* at 8-10, *United States v. North*, Crim. No. 88-0080-02 (D.D.C. filed Nov. 18, 1988).

9 Other decisions in the Second Circuit before and after *Binder* are in accord with the analysis utilized in that case. *E.g.*, *United States v.*

Binder and the cases cited in footnotes 8 and 9 are in direct conflict with the decision below. The principle on which these cases rest—that notice alone is not sufficient to save an indictment from the prohibition against *ex post facto* laws, and that the goal of the conspiracy must be an effective law or existing governmental function—is the principle inherent in this Court's decisions in *In re Medley*, *Burgess v. Salmon* and *Kring v. Missouri*, *supra*. In holding that *Binder* does not dictate the result here, the Second Circuit has failed to distinguish these authorities.

POINT III

THE SECOND CIRCUIT'S DECISION PERMITS UNLIMITED EXPANSION OF THE GENERAL CONSPIRACY STATUTE

Over the years, 18 U.S.C. § 371 has been criticized by courts and scholarly commentators who have concluded that the sweeping language of the statute, particularly the provision criminalizing conspiracies to defraud, poses significant potential for abuse.[10]

Ferrara, 458 F.2d 868, 874 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (convictions for conspiring to violate the Taft-Hartley Act as amended in 1959 did not violate the *ex post facto* clause because ". . . the conspiracy, and overt acts in furtherance thereof, continued long after the 1959 amendment to the statute."); *United States v. Smith*, 464 F.2d 1129 (2d Cir.), *cert. denied*, 409 U.S. 1076 (1972); *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972); *see Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966 (2d Cir. 1985) (to avoid *ex post facto* and due process questions, court construed treble damages provision of trademark law prospectively).

10 *See, e.g.*, Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922); Goldstein, *supra* note 8; Johnson, *The Unnecessary Crime of Conspiracy*, 61 Calif. L. Rev. 1137 (1973); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959); Note, *Conditional Objectives of Conspiracies*, 94 Yale L.J. 895 (1985); *Dennis v.*

Justice Jackson's celebrated concurrence in *Krulewitch v. United States*, 336 U.S. 440 (1949), aptly warned against the statute's undue extension:

> [T]his case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and perverse offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

336 U.S. at 445 (footnotes omitted).

Given the general rule of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,"[11] this case presents an appropriate occasion for clarifying the limits beyond which § 371 cannot be stretched.

The government acknowledged in its brief to the Second Circuit that it could not bring an indictment under the first prong of the general conspiracy statute, which makes unlawful an agreement to commit an offense against the United States, because such an indictment would violate the *ex post facto*

United States, 384 U.S. 855, 860 (1966); *Grunewald v. United States*, 353 U.S. 391, 404 (1957), and cases cited therein. The Second Circuit has cautioned that an indictment charging conspiracy to defraud under § 371 must be carefully scrutinized to protect against "very real infringements on basic values of our criminal law" inherent in such a charge. *United States v. Rosenblatt*, 554 F.2d 36, 40-41 (2d Cir. 1977).

11 *Rewis v. United States*, 401 U.S. 808, 812 (1971). *See McNally v. United States*, 107 S. Ct. 2875 (1987); *Williams v. United States*, 458 U.S. 279 (1982) (limited, technical, rather than expansive, reading of criminal statute controls); *United States v. Enmons*, 410 U.S. 396 (1973) (criminal laws are to be strictly construed).

clause. See note 7, *supra*. But by employing the conspiracy to defraud prong of the statute to seek convictions for actions that are not themselves unlawful under any other statute or regulation, and that are not intended to circumvent any lawful governmental function that is defined by a specific law or rule, the government is attempting to circumvent otherwise constitutionally insurmountable obstacles to indictment—a violation of the due process guarantee.

Although conviction for conspiracy to defraud does not require proof that some other statute or rule has actually been violated (*see, e.g., United States v. Rosenblatt*, 554 F.2d at 40-41), courts have insisted that there be a specific law, rule, regulation or practice, which defines the particular governmental function the conspiracy is intended to obstruct. See note 8, *supra*.[12]

Courts have limited the reach of § 371 by dismissing indictments or reversing convictions where the underlying conduct is not legally culpable or does not interfere with a specific government function. In *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir. 1977), the court held that merely omitting certain transactions from corporate books, standing alone, did not amount to conduct sufficient to sustain a charge of conspiracy to defraud. The government made no showing that the defendant had some otherwise cognizable duty to make the entries on which the successful carrying out of a lawful government function depended. In *United States v. Porter*, 591 F.2d 1048, the

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12 The principal decisions of this Court construing § 371 have emphasized that something more than a bare allegation of fraud is required. Thus, in *Haas v. Henkel*, 216 U.S. 462, 479-80 (1910), where it upheld a charge of conspiracy to defraud, this Court emphasized that particular laws and departmental regulations gave the government a "lawful right and duty" to release certain information at a time and in a manner specified. *Cf. Hammerschmidt v. United States*, 265 U.S. 182, 188-89 (1924) ("mere open defiance of the government purpose" by urging others to violate a law was not within the terms of the conspiracy statute, as it did not amount to the impairment or obstruction of a "lawful function" by "deceit, craft, or trickery").

Fifth Circuit reversed the conviction of defendants who participated in a scheme to receive bribes or kickbacks from Medicare reimbursements, because the conduct did not fall "plainly and unmistakably" within the proscription of § 371. The government asserted that it was "defrauded of its right to have the Medicare program conducted honestly and fairly", but the court found this insufficient to satisfy the requirement that some actual lawful function had been impaired, obstructed or defeated. 591 F.2d at 1056. *See United States v. Cogswell*, 637 F. Supp. 295, 299 (N.D. Cal. 1985) (conspiracy indictment under both parts of § 371 fails because conduct could not have violated the Currency and Foreign Transaction Act and no particulars of fraud are alleged other than scheme to evade that statute.)[13]

The indictment here recites a single aim of the conspiracy: to "circumvent and defeat the provisions of the Tax Reform Act of 1986". (A-21.) In upholding this indictment, the Second Circuit has sanctioned the further expansion of § 371 to inchoate "crimes" in conflict with the *ex post facto* and due process guarantees.[14]

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13 *See also United States v. Rosenblatt*, 554 F.2d at 40 (§ 371 requires the government to plead and prove a particular fraudulent scheme). The cases cited in the text and the Second Circuit's decision here present a conflict in the circuits concerning the definition of a lawful governmental function. *United States v. Tarnopol* makes clear that this indictment would not be upheld in the Third Circuit.

14 In every case cited by the government below to support its argument that an indictment under § 371 is sufficient if it merely alleges a general scheme to defraud by frustrating the IRS' ability to collect taxes, the *means* contemplated by the conspiracies were already prohibited at the time an illicit agreement was reached. In *United States v. Klein*, 247 F.2d 908, 915-16 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958), taxes sought to be collected were required by laws in effect at the time of the alleged conspiracy; defendants had altered corporate books, physically removed assets, made false statements on tax returns, and

CONCLUSION

Petitioners respectfully request this Court to issue the writ and consider the merits of their claim.

Respectfully submitted,

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gave false answers to government interrogatories and investigators' questions. In *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981), the manipulation of commodity prices in order to create artificial tax losses was "evidence of federal offense," *id.* at 771, which was already existing and defined by the tax and commodities regulation statutes. Thus, when entered into, the conspiracy was effectuated and its object illegal. Similarly, in *United States v. Sanzo*, 673 F.2d 64 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982), the acts (including payments of "hush money" and false book entries) were committed to evade existing personal and corporate income taxes. In *United States v. Carruth*, 699 F.2d 1017 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984), the conspiracy was to claim deductions, for fictitious cattle breeding activities, which had already been taken on tax returns and reflected on a fraudulent schedule K-1. And in *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), backdating was performed and money exchanged for the purpose of creating fraudulent shelters of income earned in prior years. At the time of the backdating, as well as when the agreement was entered into, the crime of evasion of prior years' taxes on income earned in those years was clearly defined. None of these cases addressed the issue presented here.

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December 5, 1988

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 959—August Term, 1987

(Argued April 15, 1988 Decided September 6, 1988)

Docket No. 88-1002

UNITED STATES OF AMERICA,

Appellant,

—v.—

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, JAMES C. NICHOLAS, and LEONARD NACHTMAN,

Defendants,

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, and LEONARD NACHTMAN,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and WINTER,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Brieant, C.J.) dismissing an indictment charging conspiracy to

defraud the United States (18 U.S.C. § 371) on the ground that conviction on the charge would violate the prohibition against ex post facto laws. Reversed and remanded with instructions to reinstate the indictment.

ELKAN ABRAMOWITZ, New York, N.Y., (Obermaier, Morvillo, Abramowitz & Iason, P.C., and Alan J. Brudner, New York, N.Y., of Counsel), *for Defendant-Appellee Leonard Nachtman*.

(Kronish, Lieb, Weiner & Hellman, Alan Levine and William J. Schwartz, New York, N.Y., of Counsel), *for Defendant-Appellee Samuel Rosengarten*.

(Solin & Breindel, P.C., and Kenneth I. Schacter, New York, N.Y., of Counsel), *for Defendant-Appellee Stanislaw Orlicki*.

JOHN F. SAVARESE, Assistant United States Attorney, Southern District of New York, New York, N.Y. (Rudolph W. Giuliani, United States Attorney, and Vincent L. Briccetti, Assistant United States Attorney, Southern District of New York, New York, N.Y., of Counsel), *for Appellant*.

VAN GRAAFEILAND, *Circuit Judge*:

The United States appeals from an order of the United States District Court for the Southern District of New

York (Brieant, C.J.) which dismissed an indictment charging appellees Samuel Rosengarten, Stanislaw Orlicki and Leonard Nachtman with conspiracy to defraud the United States. 18 U.S.C. § 371. The district court dismissed on the ground that conviction on the charge would violate the Constitution's ban on ex post facto laws. U.S. Const. art. 1, § 9, cl. 3.

The indictment, filed on August 13, 1987, charged appellees and one James Nicholas,[1] with conspiracy to defraud the United States by "impeding, impairing, defeating, and obstructing the lawful governmental functions of the Internal Revenue Service in the ascertainment, evaluation, assessment, and collection of income taxes" in violation of 18 U.S.C. § 371. The aim of the alleged conspiracy was to create false income tax deductions by backdating documents relating to a real estate tax shelter investment, thus frustrating the ascertainment and collection of taxes in accordance with section 501 of the Tax Reform Act of 1986, 26 U.S.C. § 469. Relying solely on dictum in *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), the district court granted appellees' motion to dismiss because the indictment alleged no overt act occurring after January 1, 1987, the effective date of section 501. For the reasons that follow, we reverse.

Congress enacted the Tax Reform Act of 1986 on October 22, 1986. Section 501(a) of the Act, 26 U.S.C. § 469(a), substantially eliminated the deductibility of losses arising out of traditional tax shelter investments. This section no longer permits taxpayers to deduct losses or credits generated by "passive" activities—those business activities in which the taxpayer does not personally

1 Nicholas pleaded guilty and is not a party to this appeal.

participate on a substantial, regular, and continuous basis—from income generated by salary, interest, dividends, and active business income. It eliminates the financial incentive of many taxpayers for investing in traditional tax shelter programs.

Although enacted on October 22, 1986, the Act did not become effective until the taxable years beginning after December 31, 1986. Tax Reform Act of 1986, Pub. L. No. 99-514, § 501(c), 100 Stat. 2085, 2241. To ameliorate the effect of the Act, Congress provided favorable tax treatment for those taxpayers already holding investments in tax shelters on the date of enactment by gradually phasing in the passive activity loss rules for such investments. Under the phase-in provisions, any interests in activities acquired after the date of enactment were made fully subject to the passive activity loss rules. For investments made before the date of enactment, up to 65 percent of passive activity losses or credits was allowed for the 1987 taxable year, and decreasing amounts were allowed thereafter until 1991, when all allowances would cease. U.S.C. 26 § 469(m).

The facts alleged by the Government, as hereinafter set forth, are accepted as true for purposes of this appeal. *United States v. Pacione*, 738 F.2d 567, 568 (2d Cir. 1984). In 1986, Rosengarten operated a tax shelter sales organization in Armonk, New York. Orlicki and Nicholas were salesmen in the organization. After the Tax Reform Act was enacted on October 22, 1986, Rosengarten and Orlicki met with a Special Agent (Agent 1) of the Internal Revenue Service, who was working undercover as one of Rosengarten's salesmen. At that meeting, Rosengarten and Orlicki indicated a willingness to backdate subsequent sales of interests in a limited partnership, tax shelter pro-

gram syndicated by the Island Planning Corporation of America, so that purchasers could take advantage of the phase-in allowances. Appellee Nachtman, a principal of Island Planning, was privy to the proposed arrangement.

Later that evening, Orlicki and Agent 1 met with a second undercover Special Agent (Agent 2), who was posing as the representative of three prospective investors. At this meeting, Orlicki made a sales pitch concerning the Island Planning program and offered to backdate the sale of a $150,000 one-half unit interest in the limited partnership. In several telephone conversations that followed, Orlicki informed Agent 2 that the Island Planning deal still was available and that subscription documents could be backdated. Agent 2 was told that his check would be "time and date stamped" and that Island Planning would provide a notary public to notarize the subscription document's execution to a date preceding October 22, 1986.

Pursuant to instructions received from Orlicki and Nicholas at a December 8 meeting, Agent 2 met with Nachtman on December 9, 1986. At that meeting, Nachtman told Agent 2 that all documents would be backdated to October 18, 1986 in order to create the scenario that the parties had come into Island Planning's offices on a Saturday to sign the documents. Nachtman also told Agent 2 that the notary was "in place" and that "we never had this conversation." The arrests of the several defendants followed.

DISCUSSION

In pertinent part, the general federal conspiracy statute, 18 U.S.C. § 371, proscribes conspiracies "to defraud the United States, or any agency thereof in any manner or for

any purpose . . . ." The term "defraud" when used in section 371 is interpreted much more broadly than when it is used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. To be guilty of violating the latter statutes, a defendant must have used fraud or deception to deprive another of a property right. *McNally v. United States*, 107 S. Ct. 2875 (1987). Violation of the former may be predicated upon a conspiracy to impair, obstruct or defeat the lawful function of any governmental department. *Dennis v. United States*, 384 U.S. 855, 860-61 (1966); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *Haas v. Henkel*, 216 U.S. 462, 479 (1910). Moreover, the impairment or obstruction of a governmental function contemplated by section 371's ban on conspiracies to defraud need not involve the violation of a separate statute. *Haas v. Henkel, supra*, 216 U.S. at 479-81; *United States v. Brasco*, 516 F.2d 816, 817-18 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United States v. Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); *Falter v. United States*, 23 F.2d 420, 423 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928). Although an indictment charging a section 371 conspiracy to defraud the United States may aver the breach of a specific statute, such breach usually is treated as "a way of consummating the conspiracy and . . . like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." *Glasser v. United States*, 315 U.S. 60, 67 (1942) (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940)).

A conspiracy to frustrate or obstruct the IRS's function of ascertaining and collecting income taxes falls clearly within the ban of section 371. *United States v. Klein*, 247 F.2d 908, 915-18 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958); *United States v. Everett*, 692 F.2d 596, 599 (9th

Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). This is so even though the contemplated substantive acts, standing alone, would not constitute a federal offense. *United States v. Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). "[A] conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws." *United States v. Hirsch*, 100 U.S. 33, 35 (1879). Indeed, to be actionable, a conspiracy need not be carried to a successful conclusion, *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 98 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); it is complete when any of the coconspirators commits an overt act. *Hyde v. Shine*, 199 U.S. 862, 76 (1905).

Application of the foregoing well-accepted principles makes it clear that the effective date of section 501 of the Tax Reform Act was not determinative of whether appellees committed the crime of conspiring to defraud the United States. Appellees were not charged with violating section 501. They were charged with a section 371 conspiracy to defraud the Government by impeding and obstruction the functions of the IRS in the ascertainment and collection of income taxes.

The indictment did not violate the Constitution's proscription against *ex post facto* laws. Article I, section 9, of the Constitution provides that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." This clause prohibits any prosecution by the Government for conduct that was innocent when performed. *United States v. Gibbs*, 813 F.2d 596, 602 (3d Cir. 1987). It is based on the principle that "persons have a right to fair warning of that conduct which will give rise to criminal penalties . . . ." *Marks v.*

United States, 430 U.S. 188, 191 (1977); *see also Casillas v. Scully*, 769 F.2d 60, 65 (2d Cir. 1985). Nothing about appellees' indictment violates this principle. As the district court observed:

> [D]efendants were painfully aware of the enactment of Sec. 501 of the Tax Reform Act of 1986, and its effect on their livelihood as promoters of real estate tax shelters. Their plans to backdate documents in order to take illegal advantage of the phase-in provision of the new law was in direct response to the terms of the law itself.

The ex post facto clause did not preclude the Government from protecting itself against appellees, who would have prevented the IRS from properly administering its affairs by conspiring to violate an already-enacted revenue statute prior to its effective date.

This Court's opinion in *United States v. Binder, supra*, does not require a different result. In *Binder*, the defendants allegedly conspired to defraud the United States by participating in transactions designed to evade a new excise tax, the Interest Equalization Tax ("I.E.T."), imposed on certain types of stock transactions. The I.E.T. statute, which was enacted on September 2, 1964, imposed the I.E.T. retroactively on all affected transactions from July 19, 1963, the date on which the President proposed the tax to Congress. Binder and his coconspirators engaged in transactions both before and after the statute was enacted which were designed to evade the I.E.T. They argued on appeal that their convictions violated the ex post facto clause because the Government was permitted to prove what the defendants had done prior to the passage of the Act. We affirmed, holding that "appellants' action prior to the enactment of the I.E.T. did not provide

the basis for their convictions, but was admitted to prove the existence of the conspiracy and its purpose." 453 F.2d at 808. We concluded that the convictions were constitutional because they were based entirely on post-enactment conduct. It is possible to read the opinion as conveying the negative implication that any pre-enactment conduct could not have been the basis for a valid conviction. If such an implication was made, it was dictum, since the conduct alleged to be unlawful all occurred post-enactment. We need not decide whether such dictum is or ought to be the law of this Circuit because the pending indictment does not allege any conduct occurring prior to enactment of the Tax Reform Act. Appellants are contending that the ex post facto clause insulates them from conviction for conduct designed to defraud the Government occurring after enactment but prior to the start of the first tax year to which the statute applies. Neither the holding nor the arguably inferrable dictum in *Binder* lends any support to that claim.

The order of the district court is reversed and the matter is remanded to the district court with instructions to reinstate the indictment.

MEMORANDUM AND ORDER

87 Cr. 662 (CLB) FILED: Nov. 25, 1987

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, JAMES C. NICHOLAS and LEONARD NACHTMAN,

Defendants.

Brieant, Chief Judge

By indictment filed on August 13, 1987, defendants Rosengarten, Orlicki, Nicholas and Nachtman were charged with conspiring to defraud the United States. The indictment cites the general conspiracy statute, 18 U.S.C. Sec. 371.

The Grand Jury charged that the defendants "unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together with others to defraud the United States of America and the Internal Revenue Service by impeding, impairing, defeating, and obstructing the lawful governmental functions of the Internal Revenue Service in the ascertainment, evaluation, assessment, and collection of income taxes." The indictment describes the goal of the conspiracy as to create false federal income tax deductions for other persons not named, by backdating documents relating to a real estate tax shelter investment so as to circumvent and defeat the provisions of the Tax

Reform Act of 1986. Eight overt acts are pleaded as allegedly committed by the defendants in furtherance of the conspiracy.

Defendant Nicholas pled guilty to the one count indictment on October 13, 1987, and proposes to testify for the Government. By motion heard and fully submitted on November 10, 1987, all remaining defendants move to dismiss the indictment under Fed. R. Crim. P. 12 on two grounds. First, they assert that the indictment fails to allege any overt act independent of the alleged agreement itself, and is therefore insufficient. Second, they contend that this prosecution is barred by the *ex post facto* clause of the United States Constitution, which states that: "No Bill of Attainder or *ex post facto* law shall be passed." Const., Art I, Sec. 9. Following dictum of the Second Circuit in *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), the Court concludes that the indictment violated the *ex post facto* clause since it alleges no overt act occurring after the effective date of the tax statute, and therefore, the motion to dismiss the indictment on that ground is granted.

There is no disputed issue of fact. Rosengarten operated a tax shelter investment sales organization from his home in Armonk, New York, in this district, where Orlicki and Nicholas worked as tax shelter investment salesmen. One of the tax shelter program syndicators with which they did business was Island Planning Corporation of America ("Island Planning"). Nachtman was a principal of Island Planning.

During the summer and fall of 1986, the defendants, being in the business of tax shelter sales, followed closely the progress in Congress of the pending so-called tax reform legislation. With much public fanfare, Section 501 of the Tax Reform Act of 1986, codified at 26 U.S.C. Sec. 469, was enacted on October 22, 1986. This statute expressly provided that it would become effective as to taxable years beginning after December 31, 1986.

Sec. 501 provides essentially that losses and credits from certain "passive" business activities amenable to tax shelter investments generally can no longer be deducted from unrelated business income such as salary, interest and dividends. The

intention is to limit drastically the deductibility of losses generated by traditional limited partnership tax shelter programs. Congress, however, provided for a phase-in period for the limitations as to the deductibility of passive losses for investments or enterprises held on or before the date of enactment, October 22, 1986. Accordingly, for taxable years beginning in 1987 through 1990, a taxpayer who entered into a tax shelter transaction on or before October 22, 1986, is eligible to take limited deductions against unrelated income for passive income losses generated thereby. *See* 26 U.S.C. Sec. 469 (*l*).

The Government contends that the defendants conspired to take advantage of the phase-in rule by fraudulent means. The defendants' scheme as presented by the Government on this motion, and assumed by the Court to be true, is that on October 23, 1986, the day after the enactment of the so-called Tax Reform Act of 1986, Rosengarten and Orlicki met with an undercover IRS agent (Agent 1), who was posing as an associate investment salesman, to review a sales pitch for a real estate tax shelter program syndicated by Island Planning. At this meeting they discussed the need to backdate documents relating to the sale of interests in real estate tax shelters in order to take advantage of the phase-in provision of the new tax bill and thereby make the deal more attractive to potential investors. Later that evening, Orlicki, accompanied by Agent 1, traveled to Newark, New Jersey, and made the sales pitch to another undercover IRS agent (Agent 2), who was posing as a representative of three prospective tax shelter customers. As part of the sales pitch, Orlicki offered to backdate the sale documents, explaining to the investors the illegal benefits which could be obtained thereby.

Over a month later, on December 5, 1986, Agent 2 had telephone conversations with both Orlicki and Nicholas. Orlicki assured him that the real estate offering syndicated by Island Planning was still available, and that subscription documents still could be backdated since a paperwork back-up at Island Planning would prevent anyone from discovering when the falsified documents had been submitted. Nicholas told Agent 2

that he could get his check time and date stamped, emphasizing the importance of making it appear as if he had committed to the deal prior to October 22, 1986.

A few days later, on December 8, 1986, Agent 2 met with Orlicki and Nicholas at their office to discuss how to consummate the sale. At the meeting Nicholas telephoned Nachtman at Island Planning, and discussed the scheme with him. Nachtman directed that the customer should backdate his check to Saturday, October 18th, since he was an out-of-town customer, and such customers often came into the office on weekends. Nachtman also said that Island Planning would arrange for a notary public to notarize all the backdated documents, so that they would appear genuine. Nicholas and Orlicki then instructed Agent 2 to take the subscription documents to Nachtman's offices the next day.

Agent 2 met with Nachtman on December 9, 1986. Nachtman explained that the notary public was in place, and that he picked the October 18th date because it was a Saturday, thus making it easy to explain why no one ever saw him in the offices. This was their last meeting. The backdated sale was never consummated.

One ground upon which the defendants move for dismissal of the indictment is that it fails to allege an overt act in furtherance of the conspiracy. They contend that all eight acts in the indictment amount to nothing more than conversations effecting the formation, reiteration or refinement of the illegal agreement, and not acts in furtherance of it. The defendants motion for dismissal on this ground is denied.

It is a well established principle that an indictment returned by a legally constituted grand jury, if valid on its face, is enough to call for trial of the charges on the merits. *Costello v. United States*, 350 U.S. 359, 363 (1956); *see e.g., United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. Contreras*, 776 F.2d 51, 54 (2d Cir. 1985); *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979). A facially valid indictment "need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged

crime, although in the case of conspiracy . . . at least one overt act must be set forth." *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

The indictment alleged eight overt acts in furtherance of the conspiracy. At oral argument on the defendants' motion to dismiss the indictment, the Government conceded that the act designated "(a)" in the indictment, the October 23rd meeting between Agent 1 and Orlicki and Rosengarten to discuss the backdating of documents, was part of the formation of the agreement, and therefore, not an overt act. The Government argued, however, that the remaining acts alleged would satisfy the statutory requirement for an overt act.

The remaining overt acts are sufficient to make the indictment facially valid, and therefore, call for a trial on the merits. While none of the acts involved the backdating or signing of tax shelter subscription documents, a telephone call or conversation alone can amount to an overt act in furtherance of a conspiracy. *See, e.g., Melia v. United States*, 667 F.2d 300, 304 & n.4 (2d Cir. 1981) (telephone call); *United States v. Armone*, 363 F.2d 385, 401 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966) (conversation). The various telephone calls and conversations within the indictment appear to be more than a refinement or reiteration of an illegal agreement. They amounted to specific acts taken in furtherance of the agreement. For example, act (h) in the indictment alleges that: "On or about December 9, 1986, in New York, New York, LEONARD NACHTMAN, the defendant, told U/C that he (NACHTMAN) would arrange to notarize U/C's signature on backdated documents." The transcript of the tape of this meeting, which I assume to be valid for the purposes of this motion, reveals that Nachtman had already made arrangements to get the documents notarized. He stated that he had already put a notary public in place. We conclude that this act amounts to more than refinement of an agreement.

The motion to dismiss the indictment on the ground that it alleges no sufficient overt act, therefore, is denied.

The defendants, however, also move to dismiss the indictment because its application of Section 501 of the Tax Reform

Act of 1986 violates the *ex post facto* clause of the United States Constitution. They argue the alleged overt acts included in the indictment for conspiracy all occurred between October 23 and December 9, 1986, prior to the Act becoming effective, which is with regard to taxable years beginning after December 31, 1986, 26 U.S.C. Sec. 469, and therefore, the agreement and acts were not criminal at the time they were done.

The *ex post facto* clause prohibits Congress from enacting any law which imposes a punishment for an act which was not punishable at the time it was committed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). The Supreme Court first considered the scope of the *ex post facto* prohibition in *Calder v. Bull*, 3 Dall. 386, 390 (1798), and the current Court's understanding of the clause is largely derived from that case. *Miller v. Florida*, 55 U.S.L.W. 4814, 4815 (1987). Justice Chase in *Calder v. Bull* explained that the meaning of *ex post facto* included: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 Dall. at 390. More recently, the Supreme Court has explained that the principle upon which the clause is based is "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States*, 430 U.S. 188, 191 (1977); *see also Weaver*, 450 U.S. at 28.

The principles behind the *ex post facto* clause have not been violated or offended by the defendants' indictment for conspiracy to defraud the United States under 18 U.S.C. Sec. 371. That statute prohibiting such conspiracies has been in effect for many years. Furthermore, defendants were painfully aware of the enactment of Sec. 501 of the Tax Reform Act of 1986, and its effect on their livelihood as promoters of real estate tax shelters. Their plans to backdate documents in order to take illegal advantage of the phase-in provision of the new law was in direct response to the terms of the law itself. There is, therefore, no concern here of the sort foreseen by the founding fathers, that the defendants were committing innocent acts with no notice or fair warning that what they were doing would later be made

criminal by the Legislative power. That is the abuse, well known in early English history, which the *ex post facto* clause seeks to prevent. *Calder*, 3 Dall. at 389 (Chase, J.)

While this Court recognizes the policy behind the *ex post facto* clause is not disturbed by the defendants' indictment, we may not ignore the Second Circuit's dictum in *United States v. Binder*, 453 F.2d 805 (1971), *cert. denied*, 407 U.S. 920 (1972), which appears to require us to grant the defendants' motion.

In *Binder*, the defendants were convicted under 18 U.S.C. Sec. 371 for conspiring to defraud the United States by evading the recently enacted interest equalization tax ("IET"), 26 U.S.C. Sec. 4911. The IET was originally proposed by President Kennedy in a speech on July 19, 1963, in order to correct a perceived undesirable flow of short-term fixed yield investment funds from the United States. *Binder* 453 F.2d at 806. The statute levied an excise tax of up to 15% on the acquisition of foreign-issue stock by United States citizens from non-citizens. *Id.* The IET statute became effective on the date of its enactment, September 2, 1964, but applied retroactively to transactions entered into after the speech by President Kennedy. *Id.* In the months prior to the enactment of the statute, and as its passage began to appear likely, American-owned foreign stock sold to American citizens commanded a premium since no IET would become due on those sales. *Id.*

The defendants in *Binder* developed a fraudulent scheme to take illegal advantage of this arbitrage opportunity. Beginning in March, 1964, prior to the effective date of the statute, they set up dummy corporations to sell foreign-owned foreign stock at American-owned foreign stock, thereby selling the stock at a premium. *Id.* After passage of the statute, from September, 1964 until March, 1965, the defendants used an American citizen living in Canada to sign the necessary papers and serve as a front to sell foreign-owned stock as American owned. *Id.*

The Court of Appeals in *Binder* determined that the defendants' convictions of conspiracy did not violate the *ex post facto* clause. *Id.* at 808. The panel upheld the conviction, finding that it was based only on attempts to evade the tax after it

became due. *Id.* The court emphasized that the acts which took place prior to the enactment date did not provide the basis of the conviction, but were properly admitted to prove the existence and purpose of the conspiracy, and the wilfulness of their evasion. *Id.*

We note that the original intent or policy behind the *ex post facto* clause is not implicated in this case, as in *Binder* since the defendants' activities were in direct response to the imminent passage of the statute. The surplus language in *Binder*, however, indicates that in this Circuit the indictment must allege some act in furtherance of the conspiracy occurring after the effective date of the statute, in order not to violate the *ex post facto* clause. *See* 453 F.2d at 808 (especially fn. 4). Despite doubts concerning the sense of such a rule, this Court can not disregard such a clear expression of legal opinion when to do so would cause the defendants to submit to the agony of a trial of an indictment to which they have no defense.

The defendants' motion to dismiss the indictment as an unconstitutional violation of the *ex post facto* clause is therefore granted, based solely on the dictum of the Court of Appeals in *Binder*.

So ordered.

White Plains, New York
November 25, 1987

CHARLES L. BRIEANT
Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October one thousand nine hundred and eighty-eight.

Present: Hon. ELLSWORTH A. VANGRAAFEILAND,
HON. JON O. NEWMAN,
HON. RALPH K. WINTER,

Circuit Judges,

Filed: Oct. 6, 1988 Elaine B. Goldsmith, Clerk

Docket No. 88-1002

UNITED STATES OF AMERICA,

Appellant,

V

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, JAMES C. NICHOLAS, and LEONARD NACHTMAN,

Defendants,

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, and LEONARD NACHTMAN,

Defendants Appellees.

A petition for a rehearing having been filed herein by Defendants-Appellants SAMUEL ROSENGARTEN, STANISLAW ORLICKI and LEONARD NACHTMAN,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

by: Fred Cassidy
Chief Deputy Clerk

INDICTMENT

87 Cr. 662 Filed: Aug. 13, 1987

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v—

SAMUEL ROSENGARTEN, STANISLAW ORLICKI, JAMES C. NICHOLAS and LEONARD NACHTMAN,

Defendants.

The Grand Jury charges:

1. From on or about October 1, 1986, through the filing of this Indictment, in the Southern District of New York and elsewhere, SAMUEL ROSENGARTEN, STANISLAW ORLICKI, JAMES C. NICHOLAS, and LEONARD NACHTMAN, the defendants, and others known and unknown to the Grand Jury, unlawfully, wilfully, and knowingly did combine, conspire, confederate, and agree together and with others to defraud the United States of America and the Internal Revenue Service by impeding, impairing, defeating, and obstructing the lawful government functions of the Internal Revenue Service in the ascertainment, evaluation, assessment, and collection of income taxes.

2. It was a goal of the conspiracy that the conspirators would create false federal income tax deductions by backdating documents relating to a real estate tax shelter investment so as to circumvent and defeat the provisions of the Tax Reform Act of 1986.

OVERT ACTS

3. In furtherance of the conspiracy, and to effect its objects, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

(a) On October 23, 1986, SAMUEL ROSENGARTEN and STANISLAW ORLICKI, the defendants, met in Armonk, New York, and discussed the backdating of sales of a real estate tax shelter investment.

(b) On or about October 23, 1986, STANISLAW ORLICKI, the defendant, traveled from Armonk, New York, to Newark, New Jersey.

(c) On or about October 23, 1986, in Newark, New Jersey, STANISLAW ORLICKI, the defendant, offered to an undercover agent of the Internal Revenue Service ("U/C") to backdate the sale of an interest in a real estate tax shelter investment.

(d) On or about December 5, 1986, in Armonk, New York, JAMES C. NICHOLAS, the defendant, made a telephone call to the promoters of the real estate tax shelter investment.

(e) On or about December 8, 1986, STANISLAW ORLICKI and JAMES C. NICHOLAS met with U/C in Armonk, New York, and discussed how to backdate documents related to U/C's proposed purchase of an interest in a real estate tax shelter investment.

(f) On or about December 8, 1986, in Armonk, New York, JAMES C. NICHOLAS, the defendant, placed a telephone call to and spoke to LEONARD NACHTMAN, the defendant.

(g) On or about December 8, 1986, in Armonk, New York, STANISLAW ORLICKI and JAMES C. NICHOLAS, the defendants, told U/C to meet LEONARD NACHTMAN in New York, New York, on December 9, 1986.

(h) On or about December 9, 1986, in New York, New York, LEONARD NACHTMAN, the defendant, told U/C that he (NACHTMAN) would arrange to notarize U/C's signature on backdated documents.

(Title 18, United States Code, Section 371.)

FOREMAN

RUDOLPH W. GIULIANI
United States Attorney

CONSTITUTIONAL PROVISION

Article I, Section 9, Clause 3:

No Bill of Attainder or ex post facto Law shall be passed.

STATUTES

Section 501 of Public Law 99-514 provides in pertinent part:

(c)(1) **In general.**—The amendments made by this section shall apply to taxable years beginning after December 31, 1986.

Title 26, U.S.C. § 469 provides in pertinent part:

§ 469. Passive activity losses and credits limited

(a) Disallowance.—

(1) In general.—If for any taxable year the taxpayer is described in paragraph (2), neither—

(A) the passive activity loss, nor

(B) the passive activity credit,

for the taxable year shall be allowed.

(2) Persons described.—The following are described in this paragraph:

(A) any individual, estate, or trust,

(B) any closely held C corporation, and

(C) any personal service corporation.

(b) Disallowed loss or credit carried to next year.—Except as otherwise provided in this section, any loss or credit from an activity which is disallowed under subsection (a) shall be treated as a deduction or credit allocable to such activity in the next taxable year.

(c) **Passive activity defined.**—For purposes of this section—

(1) In general.—The term "passive activity" means any activity—

(A) which involves the conduct of any trade or business, and

(B) in which the taxpayer does not materially participate.

(2) Passive activity includes any rental activity.—The term "passive activity" includes any rental activity.

(3) Working interests in oil and gas property.—

(A) In general.—The term "passive activity" shall not include any working interest in any oil or gas property which the taxpayer holds directly or through an entity which does not limit the liability of the taxpayer with respect to such interest.

(B) Income in subsequent years.—If any taxpayer has any loss for any taxable year from a working interest in any oil or gas property which is treated as a loss which is not from a passive activity, then any net income from such property (or any property the basis of which is determined in whole or in part by reference to the basis of such property) for any succeeding taxable year shall be treated as income of the taxpayer which is not from a passive activity.

(4) Material participation not required for paragraphs (2) and (3).—Paragraphs (2) and (3) shall be applied without regard to whether or not the taxpayer materially participates in the activity.

(5) Trade or business includes research and experimentation activity.—For purposes of paragraph (1)(A), the term "trade or business" includes any activity involving research or experimentation (within the meaning of section 174).

(6) Activity in connection with trade or business or production of income.—To the extent provided in regulations, for purposes of paragraph (1)(A), the term "trade or business" includes—

(A) any activity in connection with a trade or business, or

(B) any activity with respect to which expenses are allowable as a deduction under section 212.

* * *

(m) Phase-in of disallowance of losses and credits for interests held before date of enactment.—

(1) In general.—In the case of any passive activity loss or credit for any taxable year beginning in calendar years 1987 through 1990 which—

(A) is attributable to a pre-enactment interest, but

(B) is not attributable to a carryforward to such taxable year of any loss or credit which was disallowed under this section for a preceding taxable year,

there shall be disallowed under subsection (a) only the applicable percentage of the amount which (but for this subsection) would have been disallowed under subsection (a) for such taxable year.

(2) Applicable percentage.—For purposes of this subsection, the applicable percentage shall be determined in accordance with the following table:

In the case of taxable years beginning in:	The applicable percentage is:
1987	35
1988	60
1989	80
1990	90*.

* * *

Title 18, U.S.C. § 371:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

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* The remainder of (m) has been omitted.

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-937

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL ROSENGARTEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

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No. 88-937

SAMUEL ROSENGARTEN, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing the indictment against them on the ground that a conviction under that indictment would violate the Ex Post Facto Clause of the Constitution (Art. I, § 9, Cl. 3).

On August 13, 1987, petitioners were indicted by a federal grand jury sitting in the Southern District of New York.[1] The defendants were charged with conspiring to defraud the United States by "impeding, impairing, defeating and obstructing the lawful governmental functions of the Internal Revenue Service in the ascertainment, evaluation, assessment, and collection of income taxes," in violation of 18 U.S.C. 371. Pet. App. A3. In particular, the indictment alleged that the purpose of the conspiracy was to create false income tax deductions by backdating

[1] Also charged was co-defendant James Nicholas, who pleaded guilty (Pet. App. A3).

documents relating to a real estate tax shelter. The agreement to backdate the documents was designed, according to the indictment, to produce improper deductions under Section 501 of the Tax Reform Act of 1986, 26 U.S.C. (Supp. IV) 469. The agreement was alleged to have taken place prior to the effective date of the 1986 Act. Pet. App. A3.

Prior to trial, the district court dismissed the indictment (Pet. App. A10-A17). In the district court's view, the defendants could not be charged with conspiring to defeat the collection of taxes where the agreement took place prior to the date the pertinent tax statute went into effect. Following what it believed to be the dictates of a prior Second Circuit decision, the district court held that to convict the defendants of a crime for such conduct, without proof of some overt acts occurring after the effective date of the statute, would violate the Ex Post Facto Clause of the Constitution. Pet. App. A17.

The court of appeals reversed and remanded the case for reinstatement of the indictment (Pet. App. A1-A9). The court concluded that "a conspiracy to frustrate or obstruct the IRS's function of ascertaining and collecting income taxes falls clearly within the ban of section 371" (*id.* at A6). Therefore, the court held, the effective date of Section 501 was not determinative of whether petitioners committed the crime of conspiring to defraud the United States. As the court noted, the Ex Post Facto Clause "did not preclude the Government from protecting itself against [petitioners], who would have prevented the IRS from properly administering its affairs by conspiring to violate an already-enacted revenue statute prior to its effective date" (Pet. App. A8).

Petitioners contend (Pet. 5-14) that the decision of the court of appeals is contrary to the decisions of this Court

and other courts of appeals construing the Ex Post Facto Clause, and that the court's decision improperly construed the federal conspiracy statute, 18 U.S.C. 371. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted at trial, the issues they now present will become moot. On the other hand, if petitioners are convicted after trial, they will be able to present their Ex Post Facto and statutory claims to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

[2] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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